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No. 91-59

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ARTHUR L. CHRISTIE, III, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the administrative judge was biased against petitioner and prejudged petitioner's challenge to the decision removing him from federal service, resulting in a denial of due process.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. A23) is unpublished, but the judgment is reported at 932 F.2d 980) (Table). The final decision of the Merit Systems Protection Board (Pet. App. A19-A22) is also unreported, as is the opinion of the administrative judge (Pet. App. A1-A18).

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1991. The petition for a writ of certiorari was filed on July 8, 1991. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

The Navy removed petitioner from his position as a civilian equipment specialist primarily on account of his insubordination. The evidence supporting petitioner's removal, which is described in the opinion of the administrative judge sustaining the removal, Pet. App. A1-A18, showed that: (1) petitioner had threatened a coworker; (2) petitioner refused to accept work assignments transmitted by his supervisor through a clerk; (3) petitioner told the clerk that "he was a GS-9 and that she was not to talk to him," *id.* at A4; (4) petitioner repeatedly refused to report temporary absences to his supervisor; (5) petitioner was rude to persons who called on the telephone; (6) petitioner repeatedly refused to follow his supervisor's instructions; (7) petitioner made sarcastic, insubordinate comments regarding his failure to sign out when leaving work; (8) petitioner ignored orders not to copy attendance records; (9) petitioner repeatedly left work during working hours without permission; (10) petitioner persisted in referring to certain coworkers as "girls," despite their objections; (11) petitioner refused to meet with an acting supervisor on one occasion; and (12) petitioner refused to follow a direct instruction from his supervisor to wait until the supervisor got off the telephone before leaving the work site.

Petitioner challenged the decision of the administrative judge by attacking the judge's integrity. Both the Merit Systems Protection Board (MSPB) (Pet. App. A19-A22) and the Federal Circuit (*id.* at A23) upheld the decision of the administrative judge in summary fashion.

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

As petitioner acknowledges (Pet. 8), administrative judges are entitled to a presumption of honesty and integrity in the performance of their adjudicative duties. *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975). Petitioner does not allege that the administrative judge had a pecuniary interest in the outcome of this case, that the judge had been the target of personal abuse from petitioner, or that the judge had a role in investigating or prosecuting petitioner, situations where the probability of actual bias is high. *Ibid.* Indeed, petitioner makes no claim at all of bias from any extrajudicial source.

Instead, petitioner just alleges that the administrative judge's statements with respect to petitioner's case show that the judge was biased. More particularly, relying on *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970), petitioner claims that the administrative judge "had prejudged the case." Pet. 8. That is not so. In his petition, petitioner refers to a number of harsh comments the administrative judge made during the course of the proceedings. The MSPB and the Federal Circuit correctly concluded that those comments did not show prejudgment; taken in context, they merely show that the administrative judge was not impressed by petitioner's submissions at any stage of the proceedings.

For instance, petitioner first complains (Pet. 4) that during an off-the-record conversation the judge advised petitioner and his attorney to settle their

case. Petitioner neglects to mention that, at the time of that conversation, the administrative judge had been overseeing the case for nearly a year and was well-versed with respect to petitioner's arguments and his evidence. C.A. App. 292-299, 325-327. Thus, the judge's comments did not show prejudgment—as might a statement that plaintiffs challenging adverse personnel actions always lie or that federal supervisors are consistently truthful—but instead reflects the judge's preliminary assessment of the strength of the evidence in this case. Petitioner offers no support for his apparent contention that a preliminary appraisal of the merits of a case by a judge constitutes a denial of due process, a contention that would undermine the common practices of many courts.[1]

Among the many other comments about which petitioner complains, one appears on its face to show objectionable prejudgment—the administrative judge's statement (Tr. 175; see Pet. 7), with respect to testimony of the Navy employee who had made the final removal decision, that "I think his testimony is probably going to be identical to the final decision of

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[1] Comments designed to foster settlement are quite different in nature from the statements the D.C. Circuit found objectionable in *Cinderella Career & Finishing Schools*. In that case, the Chairman of the Federal Trade Commission had made a public speech that made his position clear with respect to a case pending before the Commission. The court of appeals found that "[c]onduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." 425 F.2d at 590. In this case, of course, none of the administrative judge's comments about which petitioner complains were made in public speeches.

the issue." In context, however, it is clear that the judge was *not* referring to the decision *he* was going to render in this case, but was instead referring to the final decision the Navy employee had rendered removing petitioner from his employment; that is, all the judge was saying was that it appeared that the employee's testimony would not vary from the employee's written statements. The judge made the comment after the government's counsel had asked for permission to submit an affidavit in lieu of testimony from that employee. The judge said that "I think his testimony is going to be identical to the final decision in this case," and the government's counsel responded, "Yes, it will be. That's all I was going to put him on for," which prompted the judge to say "I don't know if he could add anything." Tr. 175-176. Thus, in context, the comment at issue did not show that the administrative judge had made up his mind, but only that the judge was willing to rely on the affidavit and decision of the Navy employee and did not think that the employee's oral testimony was required.

The other comments about which petitioner complains, considered in context, show only the administrative judge's assessment of the strength of petitioner's case at various points, and do not show that the judge was biased against petitioner or that he had prejudged the case. In any event, there is no need for this Court to reconsider petitioner's fact-bound claims of bias and prejudgment, which were rejected by the MSPB and the Federal Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1991

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